SUPREME COURT, U. S.

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No. 71-1100

In the Supreme Court of the United States

OCTOBER TERM, 1971

STATE OF ILLINOIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	11
Appendix A	12
Appendix B	23

CITATIONS

Cases:

Chapman v. *United States*, N.D. Ill., No. 66C2335, decided May 24, 1968	8
Corning Glass Works v. *Puerto Rico Water Resources Authority, Inc.*, 396 F. 2d 421	10
Darby v. *L. G. DeFelice & Son*, 94 F. Supp. 535	8
Erie R. Co. v. *Tompkins*, 304 U.S. 64	9
Hans v. *Louisiana*, 134 U.S. 1	9
Hill v. *United States*, M.D. Tenn., No. 4545, decided March 19, 1969; reversed on other grounds, 453 F. 2d 839	8
Lee v. *Brooks*, 315 F. Supp. 729	8
Miller v. *DeWitt*, 37 Ill. 2d 273, 266 N.E. 2d 630	10
Parks v. *United States*, 241 F. Supp. 297	7, 8
Schetter v. *Housing Authority of the City of Erie*, 132 F. Supp. 149	8

Cases—Continued Page

United States v. *California*, 328 F. 2d 729, certiorari denied, 397 U.S. 817 9
United States v. *Nevada Tax Commission*, 439 F. 2d 435 10
United States v. *Texas*, 143 U.S. 621 9
United States v. *Yellow Cab Co.*, 340 U.S. 543 7
Williams v. *United States*, 42 F.R.D. 609 8

Constitutions and statutes:

United States Constitution, Eleventh Amendment 3, 9, 10
28 U.S.C. 1251(b) 9
28 U.S.C. 1345 ..... 3, 6, 7, 9
Illinois Constitution:
Article 4, Section 26 9
Article 13, Section 4 9

Miscellaneous:

Federal Rules of Civil Procedure:
Rule 14 7
Rule 14(a) 3, 7, 8
Note, 65 Col. L. Rev. 1506 (1965) 8
Note, 64 Mich. L. Rev. 948 (1966) 8, 10
6 Wright & Miller, *Federal Practice and Procedure:* Civil § 1442 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 454 F. 2d 297. The district court's findings and conclusions (App. A, *infra*) and its opinion denying the motion to dismiss (App. B, *infra*) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1971, and a timely petition for re-

hearing was denied on December 27, 1971. The petition for a writ of certiorari was filed on February 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction to implead a State on the basis of a third-party complaint for indemnity brought by the United States.

2. Whether the lower courts correctly found that the State of Illinois had been actively negligent and the United States passively negligent.

STATEMENT

This suit was brought against the United States under the Federal Tort Claims Act on behalf of four individuals killed or injured at the 1966 Illinois State Fair, when a portion of a catwalk atop the grandstand broke loose during a performance by the Green Berets, an Army Special Forces Unit (Pet. App. A2).[1] The United States filed a third-party complaint

[1] The performance included a demonstration of traversing an open area by sliding down a rope anchored to a fixed object high above the ground and kept taut by a truck or tractor (Pet. App. A3). Petitioner's employee required the Green Berets to anchor the rope to the metal stanchions supporting the catwalk, which he represented to be welded to the grandstand's superstructure (Pet. App. A4). The stanchions in fact were attached with wood screws, and during one performance the pressure exerted in keeping the rope taut pulled the catwalk loose (Pet. App. A5).

against petitioner, the State of Illinois, alleging that the accident resulted from the active negligence of petitioner's employees, and that the Army's negligence was at most passive. The United States sought recovery under Illinois law, which permits a passively negligent tortfeasor to obtain full indemnity from an actively negligent tortfeasor, for any damages it might be required to pay the plaintiffs (Complaint, App. 7-9).[2]

The district court denied petitioner's motion to dismiss. It held (1) that the Eleventh Amendment to the Constitution did not immunize the State from suits by the United States, and (2) that neither Rule 14(a) of the Federal Rules of Civil Procedure, governing impleading, nor 28 U.S.C. 1345, giving the district courts jurisdiction of civil suits by the United States, barred the action (App. B, *infra*).

1. The evidence at the trial showed that prior to the date performances began, representatives of the Green Berets visited the fair grounds to determine where to attach the ropes used in their performance. The manager of the fair told them that his grandstand manager, Heger, would determine "where they would tie the ropes and when they would do it" (Tr. 79; see Pet. App. A4). After the officers explained they would need a secure anchoring point, Heger instructed them to tie the rope to metal stanchions protruding from the grandstand roof which supported the catwalk. Heger explained that the stanchions were

[2] "App." references are to the joint appendix in the court of appeals. "Tr." references are to the trial transcript.

"welded, metal to metal to the superstructure" of the grandstand (Pet. App. A4; Tr. 917).[3] At that time, it was not possible to gain access to the roof to check the connection, and the Fair Manager did not provide the Green Berets with available blueprints, which showed that the stanchions were attached to the roof only by small wood screws (Pet. App. A4).

When the entire Green Beret unit arrived at the Fair, Heger directed the non-commissioned officer who supervised the traversing to anchor his rope to the stanchions and no place else, leaving him the discretion only to choose which stanchion (Pet. App. A4). Later, when the Commanding Officer of the Green Berets asked permission to cut into the roof with a penknife to check the connection, Heger insisted the contact was welded and permitted no further inspection (Pet. App. A4; Tr. 451, 484).

Twice-daily performances began on August 12, and continued without incident until August 19. The Green Berets tested the rope's tautness just prior to descending the rope, "at the time that everybody was seated in their chairs for the appearance" (Tr. 336).[4]

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[3] The district court found that the stanchion would have withstood the strain placed upon it if it had been welded as Heger represented it was (Pet. App. A5; Finding of Fact 7, App. A, *infra*, p. 15).

[4] Petitioner states that the rope was tested while the stands were empty for every performance except the performance on the day the accident occurred (Pet. 3, 10). An employee of the State who operated the truck pulling the rope tight testified that this had been done while the audience was in place on every occasion; other testimony was to the same effect (Tr. 326, 336, 800, 827). See Finding of Fact 13, App. A, *infra*, p. 16.

Just before the performance on Saturday, August 20, Heger informed the Green Berets that the truck would have to be moved slightly to permit auto races to take place in front of the stands while the Green Berets were performing. After the truck was repositioned, and as it was pulling the line taut, the stanchion and a portion of the catwalk were pulled loose from the roof (Pet. App. A5; Tr. 795-797). Three individuals were killed and two spectators were seriously injured (Pet. App. A5).

2. The district court held (App. A, *infra*) the United States liable to the plaintiffs, and required petitioner to indemnify the United States. The court found that the Green Berets had been passively negligent in relying upon erroneous information given them by petitioner's employee—that the stanchions were welded to the superstructure and hence safe as an anchor-point—without conducting an adequate inspection to verify this information (Conclusion of Law 2, App. A, *infra*, p. 18).[5] The court found that petitioner was actively negligent and therefore was required under Illinois law to indemnify the United States (Conclusions of Law 2 and 9, App. A, *infra*, pp. 18, 21).

The court based this holding upon its findings that Heger, an agent of the State of Illinois, had told the

[5] The trial was interrupted on the second day so that the trial judge could observe the grandstand area. At that time it was apparent that the Green Berets could have climbed into a "crow's nest" underneath the roof and from there have observed that the metal superstructure did not extend to the catwalk area.

Green Berets the catwalk was welded when in fact it was attached to the roof with wood screws; had forbidden the Green Berets from cutting into the roof tar to determine if the stanchion was welded; had required the Green Berets to anchor the rope to the stanchion and refused permission to tie it anywhere else; and had failed to make available blueprints in the State's possession showing the actual connection (Findings of Fact 6, 7, 10, 12, 13, 16; App. A, *infra*, pp. 15-16, 17).[6]

The court of appeals affirmed, holding that the State of Illinois was not immune from suit by the United States in a third-party action. The court pointed out that the right asserted by the United States was a claim that it had suffered a loss by reason of the State's negligence, and that the United States could have brought an independent suit against the State on that claim (Pet. App. A7).[7] It held that the jurisdiction of the district courts under 28 U.S.C. 1345 over "all civil actions, suits or proceedings commenced by the United States" covers third-

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[6] The district court held that Illinois was entitled to be reimbursed in part under an insurance contract issued by Lloyd's of London. This determination was reversed on appeal (Pet. App. A11).

[7] Petitioner conceded in the court of appeals that it could be sued as an original matter by the United States: "While the United States has a right to sue the State of Illinois under the United States Constitution where it is a party plaintiff, it cannot implead the State of Illinois in a suit brought by citizens of Illinois against the United States. Rule 14 * * * only permits an impleader where the United States is an origial plaintiff" (Reply brief, p. 3).

party actions, and it rejected petitioner's argument that it could not be impleaded under Rule 14 because it was not a "person" within the meaning of the rule (Pet. App. A7-A8). The court affirmed the findings of active and passive negligence, noting that under Illinois law such questions "and their relationship to primary liability for injuries flowing therefrom are essentially questions of fact to be determined on a case by case basis" (Pet. App. A9).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the federal district courts lack jurisdiction to implead a State on the basis of a third-party complaint for indemnity brought by the United States. Petitioner fails to explain the reasoning underlying this contention. However, in citing *Parks* v. *United States*, 241 F. Supp. 297 (N.D. N.Y.), petitioner presumably takes the position that a State is not a "person" within the contemplation of Rule 14(a), Fed. R. Civ. P., which permits impleader of "a person not a party to the action who is or may be liable to [the third-party plaintiff] for all or part of the plaintiff's claim against him." [8] This position is not sustainable.

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[8] By citing *Parks* petitioner may also intend to assert that, without regard to the meaning of the word "person" in Rule 14(a), the district court's jurisdiction under 28 U.S.C. 1345 extends only to "proceedings commenced by the United States" and not to impleader by the United States in an action commenced by another party. However, it is commonly accepted that the federal courts have jurisdiction over impleaders by the United States. *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 551-552. Such jurisdiction may be justified either on the

Impleader of state and municipal instrumentalities has long been permitted. See *Darby* v. *L.G. DeFelice & Son*, 94 F. Supp. 535 (E.D. Pa.), and *Schetter* v. *Housing Authority of the City of Erie*, 132 F. Supp. 149 (W.D. Pa.). Since the decision in *Parks* several district courts, in addition to the court below, have explicitly rejected its reasoning and have permitted the United States to implead a State.[9] *Williams* v. *United States*, 42 F.R.D. 609 (S.D.N.Y.); *Lee* v. *Brooks*, 315 F. Supp. 729 (D. Hawaii); *Chapman* v. *United States*, No. 66C2335 (N.D. Ill.), decided May 24, 1968; *Hill* v. *United States*, Civ. No. 4545 (M.D. Tenn.), decided March 19, 1969, reversed on other grounds, 453 F. 2d 839 (C.A. 6).[10] Furthermore this Court has held that the United States is a "person" for the purposes of Rule 14(a) and may be impleaded. *United States* v. *Yellow Cab Co.*, 340 U.S. 543.

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basis that the impleader is itself a "proceeding" for purposes of the statute or that power to settle the third-party claim derives from the doctrine of ancillary jurisdiction.

[9] The reasoning in *Parks* has also been severely criticized by commentators. See, *e.g.*, Note, 64 Mich. L. Rev. 948 (1966); Note, 65 Col. L. Rev. 1506 (1965). These comments do not demonstrate, as petitioner suggests (Pet. 7), a "wide spread public interest" in whether the United States may implead a State; rather they are devoted to showing that *Parks* was wrongly decided.

[10] Petitioner asserts (Pet. 7) that "[t]here is a conflict in the Federal Courts." In fact, there is only conflict within the Second Circuit. The court below is the only court of appeals that has decided this issue.

Petitioner offers no reason why the word "person" here should include the United States but not an individual State. There is nothing in the language, history, or purpose of the Rule which would justify such an interpretation. To the contrary, the impleader of states furthers the purpose of Rule 14(a), which is to promote judicial effiicency by eliminating circuity of actions.[11] See generally 6 Wright & Miller, *Federal Practice and Procedure:* Civil § 1442.

There are no constitutional barriers to the impleader of a State by the United States. The Eleventh Amendment protects the right of an unconsenting State to be immune from suit by its own citizens,[12] *Hans* v. *Louisiana*, 134 U.S. 1, but it does not apply to suits brought against a State by the United States. *United States* v. *Texas*, 143 U.S. 621. The United

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[11] In this case, for example, inability to implead petitioner would have necessitated an additional lawsuit. It would not have affected the right of the United States to institute a civil action against petitioner in a federal district court. District courts have jurisdiction over such original suits under 28 U.S.C. 1345. *United States* v. *California*, 328 F. 2d 729 (C.A. 9), certiorari denied, 379 U.S. 817; cf. 28 U.S.C. 1251(b). Nor would it have affected the substantive right of the United States to obtain indemnification from petitioner. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.

[12] Petitioner suggests that the decision will nullify Art. 4 § 26 of the Illinois Constitution (Pet. 6, A14). However, this provision has been superseded by Art. 13, § 4, effective January 1, 1972, which provides: "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

States here seeks recovery on its own behalf, not as an agent or on behalf of the original plaintiffs.[12]

The plaintiffs have no financial or legal interest in the third-party action; impleader does not result in their obtaining "some advantage inconsistent with the state's prerogative not to be sued by [them]." Note, 64 Mich. L. Rev. 948, 951. Thus there is no violation here of either the language or the spirit of the Eleventh Amendment. The decision by the court of appeals is correct and further review is not warranted.

2. Illinois law permits a passively negligent tortfeasor to recover full indemnity from an actively negligent tortfeasor. *E.g.*, *Miller* v. *DeWitt*, 37 Ill. 2d 273, 226 N.E.2d 630. The determination of the degree of negligence under Illinois law is basically a question of fact (Pet. App. A9). Both lower courts reviewed the evidence and concluded that the State had been actively negligent and primarily responsible for the accident, while the United States was only

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[12] This point should be sufficient to answer petitioner's contention (Pet. 8-9) that the recovery by the United States "violates the public policy of the State of Illinois which limits personal injury claims to $25,000 each" (Pet. 8): the claim of the United States was not for personal injury but for indemnity. Furthermore, a third-party plaintiff can recover even where a direct suit by the plaintiff against the third-party defendant is barred, *Corning Glass Works* v. *Puerto Rico Water Resources Authority, Inc.*, 396 F. 2d 421 (C.A. 1), and a state limitation upon the amount that may be recovered against it in its courts does not apply to suits by the United States in federal courts. *United States* v. *Nevada Tax Commission*, 439 F. 2d 435 (C.A. 9).

passively negligent. There is no occasion for this Court to review this factual determination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1972.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Civil No. 4189

GENEVIEVE W. HEGER, Administrator of the
Estate of RALPH G. HEGER, dec'd.

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4236

WALTER KLINE

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4187

RONALD DREWETT

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4272

ANTHONY A. BLOEMER, Public Admr. of
Estate of DALE R. MUELLER

—*vs*—

UNITED STATES OF AMERICA

Civil Nos. 4189, 4236, 4187 and 4272

UNITED STATES OF AMERICA,
DEFENDANT AND THIRD PARTY PLAINTIFF

—*vs*—

STATE OF ILLINOIS, THIRD PARTY DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been submitted to the Court upon pleadings, upon the stipulation of certain facts agreed to between the parties herein and the oral testimony introduced in open court and the Court having considered the same and being well and fully advised, hereby makes the following Findings of Fact and states the following Conclusions of Law, to wit:

FINDINGS OF FACT

1. The subject matter of this action comes under the purview of the Federal Tort Claims Act, 28 U.S.C. 2671 et seq.

2. The defendant and the Third Party Plaintiff is the United States of America; and at all times relevant herein, the members of Company D, Seventh Special Forces Group of the United States Army, Fort Bragg, North Carolina, hereinafter called Green Berets, were agents, servants and employees of the United States Government and were acting within the scope of their employment.

3. The Third Party Defendant and Fourth Party Plaintiff is the State of Illinois.

4. The Fourth Party Defendant is Underwriters at Lloyd's, London. There was in effect at the time of the accident, a contract of insurance between

Fourth Party Defendant Underwriters at Lloyd's, London and the Illinois State Fair, the Illinois State Agency, General Manager, all Personnel, and the United States Auto Club. The said contract contained a clause in which Lloyd's agreed "to pay on the behalf of the Assured, all sums which the Assured shall become legally obligated to pay as damages because of: A(1) bodily injury, sickness or disease, including death at any time resulting therefrom sustained by any person, caused by accident, and arising out of the ownership maintenance or use of the premises stated above, for the purpose of automobile racing events, including practice and time trials on reported race days." The Limits of Liability of said policy are as follows: "The Underwriters' Liability for loss hereunder is limited to the sum of: Five-Hundred Thousand Dollars ($500,000.00) for bodily injuries or death of any one person, and Five-Hundred Thousand Dollars ($500,000.00) any one accident resulting in injuries to more than one person, and Five-Hundred Thousand Dollars ($500,000.00) for damage to property resulting from any one accident, the Assured to assume and pay the first $50.00 each accident resulting in property damage claim."

5. There is located in Springfield, Sangamon County, Illinois, property known as the Illinois State Fairgrounds, which is operated by the State of Illinois, by and through its agency known as the State Fair Agency, which property is used annually for purposes of putting on the Illinois State Fair. On August 20, 1966, said Illinois State Fair grounds and more particularly the grandstand and race track adjacent thereto, and activities conducted therein, were under the control and direction of the State of Illinois and on said date the State of Illinois was conducting auto-

mobile races, interspersed with other entertainment for which admission was charged to the general public.

6. There were on file with the State of Illinois in Springfield, certain blueprints and certain plans showing the construction and then present condition of a certain platform used for electric lights stationed on top of said grandstand. Said blueprints and plans showed that said platform, commonly called a catwalk, was approximately sixty-eight feet in length and consisted of boards fastened to angle irons, which said angle irons were attached to the wooden portion of said grandstand by 1½" wood screws and were not welded to any portion of the steel beams of the grandstand.

7. Ralph G. Heger, was at all times mentioned herein, an agent of the State of Illinois and represented to the Green Berets that the platform was welded to the superstructure of the grandstand, and that had this been true as represented the platform would have withstood the tension placed upon it.

8. Prior to the opening of the 1966 Illinois State Fair the State of Illinois invited the said Green Berets to appear and put on their exhibition during the fair, which invitation was accepted by the Green Berets after their officers had made an inspection trip in the City of Springfield at the State Fair Grandstand.

9. The said Green Berets were specially trained in conducting traversing and rappelling techniques and during the 1966 Illinois State Fair the said Green Berets put on numerous rappelling and traversing demonstrations and also exhibited ammunition, uniforms and other educational material in connection with the conduct of Green Beret activities.

10. The Commanding Officer of the Green Beret unit was forbidden by agents of the State of Illinois

from cutting into the roof of the grandstand to determine the manner in which the said platform was secured.

11. For their exhibition the Green Berets fastened a 7/16" nylon rope to one of the metal angle irons of said platform and attached the other end to either a tractor or a truck on the other side of the race track, depending upon which day it was used and said rope was stretched to a degree of tension sufficient to allow a man to traverse down the line to the vehicle.

12. The State of Illinois, having knowledge as to how said platform was attached to said roof, failed to inform the Green Berets of the same and more particularly after having witnessed the use of said platform and the tension placed upon the same on numerous occasions, made no attempt to warn the Green Berets nor to protect the public.

13. On August 20, 1966, the course of conduct followed by the Green Berets was identical to that followed on the previous days, except for the fact that the vehicle was moved further into the infield and away from the track, at the request of the automobile race officials, so that the traverse rope was high enough to allow the racing automobiles to pass thereunder during time trials which were being simultaneously conducted.

14. At approximately 1:15 P.M. on August 20, 1966, the rope was attached to the vehicle and stretched to the desired degree of tension, whereupon a portion of the said platform was loosened from its moorings and fell into the crowd below.

15. The Green Beret personnel relied on the information supplied by the State of Illinois and failed to inspect the manner of attachment of the said plat-

form to the superstructure of the grandstand from underneath said structure or by blueprints.

16. The State of Illinois through its agency, the State Fair Agency, and its agents retained at all times here pertinent, complete control of the physical premises of the grandstand and its environs, as manifested by the retention of the key to the roof of the grandstand and the requirement that civilians wishing to get on the roof had to secure a pass from the official agent of the Illinois State Fair Agency. The State of Illinois refused to allow the Green Berets to attach their rope to places atop the grandstand other than the ultimate tie-off point as suggested by the Green Berets and designated that the Green Berets tie their rope at the base of the stanchion supporting the catwalk.

On the day of the accident the repositioning of the tie-off vehicle created a less radical rope angle and thereby reduced the tension downward and increased the outward thrust on the platform, and said repositioning and consequent alteration of the thrust was a contributory cause of the accident.

17. The Court finds that Ralph G. Heger, an employee of the Theatrical Stage Union, Local No. 138, loaned to the State of Illinois, was not in exercise of due care for his own safety in that he made certain statements to the Green Beret personnel about matters which he knew or should have known he did not have sufficient expertise to make, and thereby materially contributed to his own death.

18. The Court finds that on August 20, 1966, the plaintiffs, Ronald Drewett, Walter Kline and Dale R. Mueller exercised due care and caution for their own safety.

CONCLUSIONS OF LAW

1. The Court hereby finds that the Court has jurisdiction over all parties to this lawsuit. Rule 12(h) Federal Rules of Civil Procedure. Wyrough and Loser, Incorporated v. Pelmor Laboratories, Incorporated, 376 F.2d 543 (CA 7) (1967). The law of the State of Illinois governs all substantive issues.

2. The defendant, United States of America, through its agents, was negligent in that the Green Berets relied upon the representations of the agents of the State of Illinois and failed to conduct inspections adequate to reveal the manner in which the platform was affixed to the superstructure of the grandstand.

The acts of the State of Illinois, through its employees, constituted negligence in that they were in complete control of the premises and environs of the grandstand; the agents of the State directed the Green Berets to tie-off the stanchions supporting the platform and forbid them to tie-off elsewhere on the roof of the grandstand; the State of Illinois had special knowledge of the construction of said platform and after observing its use, failed to warn the Green Berets of such construction and in fact prohibited the Green Berets from cutting into the roof of the grandstand to determine the manner of attachment.

The Court concludes that in view of the virtually complete direction and control exercised by the employees of the State of Illinois over the physical premises of the grandstand and the activities conducted thereabout, the acts of the employees of the State of Illinois constituted active negligence, and that the negligence of the employees of the United States of America constituted passive negligence. American Telephone and Telegraph Company v. Leveque, 30 Ill.

App. 2d 120, 173 NE 2d 737 (1961), John Griffiths & Son, Company v. National Fireproofing Company, 310 Ill. 331, 141 NE 739 (1923).

3. The court finds that the purported "agreement" between the State of Illinois and Dale R. Mueller is inadmissible in evidence as it is not an original document and no foundation was laid to allow the copy into evidence under the Best Evidence Rule. The Court also finds that no showing was made that the signature on the document was that of the decedent, Dale R. Mueller.

The "agreement" allegedly concluded between the State of Illinois and Dale R. Mueller has no bearing on this lawsuit as the cause of action brought by Anthony A. Bloemer, Public Administrator of the Estate of Dale R. Mueller, arose under the Illinois Wrongful Death Act at the time of death. Under the laws of the State of Illinois, a release or exculpatory agreement executed by the deceased before death does not bar a right of recovery for the benefit of statutory beneficiaries. Ohnesorge v. Chicago City Railway Company, 259 Ill. 424.

4. The plaintiff, Anthony A. Bloemer, as Administrator of the Estate of Dale R. Mueller, sustained damages in the amount of Thirty Thousand Dollars ($30,000) from the occurrence here in question. By virtue of the passive negligence of its agents, the United States of America is liable to plaintiff Anthony A. Bloemer, as Administrator of the Estate of Dale R. Mueller.

In consideration of these findings of fact and conclusions of law, it is hereby Ordered, Adjudged And Decreed that the United States of America pay Anthony A. Bloemer, as Administrator of the Estate of Dale R. Mueller, the sum of Thirty Thousand Dollars ($30,000) and costs of suit.

The Court further finds that plaintiff Anthony A. Bloemer, as Administrator of the Estate of Dale R. Mueller, sustained property damages in the amount of Two Hundred Sixty-Five Dollars ($265) and that the United States of America, by virtue of the passive negligence of its agents is liable to the plaintiff Anthony A. Bloemer in the sum of Two Hundred Sixty-Five Dollars ($265) and is hereby Ordered to pay such sum to plaintiff Anthony A. Bloemer.

5. The plaintiff, Grace M. Mueller, individually, sustained damages in the sum of Two Thousand Five Hundred Eighty-Two and 03/100 Dollars ($2,582.03) on account of the funeral expenses of Dale R. Mueller, and the defendant, the United States of America, by virtue of the passive negligence of its agents, is liable to the plaintiff, Grace M. Mueller, individually, in the sum of Two Thousand Five Hundred Eighty-Two and 03/100 Dollars ($2,582.03) and costs of suit, and a judgment is hereby entered in consideration of these Findings of Fact and Conclusions of Law against the defendant, the United States of America, in the sum of Two Thousand Five Hundred Eighty-Two and 03/100 Dollars ($2,582.03) plus costs of suit.

6. Genevieve W. Heger, as Administratrix of the Estate of Ralph G. Heger and Genevieve W. Heger, individually, is barred from recovery because it was not proven that the decedent Ralph G. Heger was in due care for his own safety and well being as required by Illinois law. Carter v. Winter, 32 Ill. 2d 275, 204 NE 2d 755 (1965), McKinney v. Illinois Power, 26 Ill. App. 2d 193, 167 NE 2d 249 (1960).

7. The plaintiff Ronald Drewett sustained damages from the occurrence here in question. By virtue of the passive negligence of its agents, the United States of America is liable to plaintiff Ronald Drewett.

In consideration of these Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged And Decreed that the United States of America pay the plaintiff Ronald Drewett the sum of Four Hundred Eighty Thousand Dollars ($480,000.00) plus costs of suit.

8. The plaintiff Walter Kline sustained damages from the occurrence here in question. By virtue of the passive negligence of its agents, the United States of America is liable to plaintiff Walter Kline.

In consideration of these Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged And Decreed that the United States of America pay the plaintiff Walter Kline the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) plus costs of suit.

9. The Third Party Defendant, State of Illinois, by virtue of the active nature of its negligence, is ordered to indemnify the United States of America, in full for all monies paid by defendant, United States of America, as set forth in this order.

10. Any ambiguity or doubt as to the proper construction of the contract of insurance between Underwriters at Lloyd's London and the Illinois State Fair, the Illinois State Agency General Manager, all Personnel and the United States Automobile Club, shall be resolved against the insurer. Forest City Insurance Company v. Hardesty, 182 Ill. 39, 55 NE 139, McAllister v. Hawkeye Security Insurance Company, 68 Ill. App. 2d 222, 215 NE 2d 477.

11. The State of Illinois is the sovereign body under which the Illinois State Fair Agency is organized and exists and, therefore, coverage of the State of Illinois was contemplated under the contract of insurance between Underwriters at Lloyd's London and the State Fair Agency.

12. The Court hereby concludes that the injuries to plaintiffs Ronald Drewett, Walter Kline and Dale R. Mueller, the result of the catwalk being pulled from the roof, arose out of the ownership, maintenance and use of the Illinois State Fair grandstand for purposes of automobile racing events.

13. Fourth Party Defendant, Underwriters at Lloyd's London is, therefore, Ordered to pay the Third Party Defendant, State of Illinois, in an amount equal to the payments for damages as provided by its policy of insurance and the costs of but not to exceed the applicable limits of said policy of insurance.

14. The attorneys for each of plaintiffs, Drewett, Kline and Bloemer, Administrator for Mueller, are awarded a sum equal to Twenty Per Cent (20%) of said judgments, as attorney's fees to be paid from the judgments so rendered, plus attorney's reasonable costs of suit expended.

15. Any finding of fact which is deemed to be a conclusion of law is hereby adopted as a Conclusion of Law.

Entered this 27th day of February, 1970, at Springfield, Illinois.

/s/ Omer Poos
United States District Judge
Chief Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
SOUTHERN DIVISION

Civil No. 4189

GENEVIEVE W. HEGER, Administrator of the Estate of RALPH G. HEGER, dec'd.

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4236

WALTER KLINE

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4187

RONALD DREWETT

—*vs*—

UNITED STATES OF AMERICA

Civil No. 4272

ANTHONY A. BLOEMER, Public Admr. of Estate of DALE R. MUELLER

—*vs*—

UNITED STATES OF AMERICA

Civil Nos. 4189, 4236, 4187 and 4272

UNITED STATES OF AMERICA,
DEFENDANT AND THIRD PARTY PLAINTIFF

—*vs*—

STATE OF ILLINOIS, THIRD PARTY DEFENDANT

ORDER

This cause having heretofore been taken under advisement upon the motion of the State of Illinois, which motion moves this Court to dismiss the Third Party Complaint of the United States of America, in the above-entitled causes, the Court, being fully advised in the premises, and after due consideration of all the pleadings and written briefs submitted herein, finds that said motion to dismiss is not well taken and there is no merit in it.

Simply stated, the issue in dispute involves the interpretation of the plain words of Rule 14(a) of the Federal Rules of Civil Procedure. Those words mean what they say. Neither the Eleventh Amendment of the United States Constitution nor Section 26 of Article IV of the Illinois Constitution applies. The impleader action in question merely involves the United States of America against the State of Illinois; and, as against the United States, the State of Illinois has no sovereign immunity. No other meaning can be read into this third party complaint. See, generally, Rule 14(a), Federal Rules of Civil Procedure; 28 U.S.C. sections 1251(b)(2) and 1345; United States v. State of California, 328 F. 2d 729 (9th Cir. 1964) cert. denied 379 U.S. 817 (1964); Williams v. United States, 42 F.R.D. 609 (S.D. N.Y. 1967); and Chap-

man v. United States, as yet unreported opinion No. 66C2335 (N.D. Ill. E. D. 1968).

The Court also takes note of the salutary purpose of Rule 14(a) to consolidate common issues and eliminate duplicitous litigation, thereby preserving judicial energies and securing the just, speedy and inexpensive determination of every action. See also Rule 1, Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED that the motion of the State of Illinois to dismiss the Third Party Complaint of the United States be, and the same is hereby denied.

Entered this 3 day of February, 1969 at Springfield, Illinois.

/s/ Omer Poos
United States District Judge
Chief Judge

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